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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF OF DEANS OF DIVINITY SCHOOLS AND RABBINICAL INSTITUTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF DEANS OF DIVINITY SCHOOLS AND RABBINICAL INSTITUTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*[1]

Amici are deans of accredited seminaries, theological schools, and rabbinical institutions, the president of a school of religion and the vice president of a rabbinical school. *Amici* submit this brief to

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel, made any monetary contribution to the preparation and submission of this brief.

address the critical, yet unfounded, assumption on which Petitioners' argument is built: that being a homosexual has been widely understood by the members and sponsors of Boy Scout troops to be inconsistent with the mission of moral education embraced by the Boy Scouts of America. There is no clear consensus among religious scholars or within religious organizations that a gay man or boy cannot be "morally straight" and "clean," and there is no proper basis to infer that these commitments contained in the Scout Oath and Law are generally understood by those who participate in the Boy Scouts to preclude membership to someone who is homosexual.

Amici are leaders of institutions that are engaged full-time in religious scholarship and theological education. These institutions train priests, ministers and rabbis who provide moral leadership to our country and who run many of the religious organizations that sponsor the Scouts' programs. *Amici* are familiar with the moral and religious issues surrounding homosexuality, and have well-considered insights into the diverse religious traditions of this country – a number of which do not exclude gays and lesbians from their understanding of morality, as Petitioners' presume. The *amici* are:[2]

Dr. Susan E. Davies, Academic Dean and Jonathan Fisher Professor of Christian Education at Bangor Theological Seminary in Bangor, Maine. Bangor Theological Seminary is an ecumenical

[2] *Amici* submit this brief in their individual capacities. Institutional affiliations of *amici* are provided for identification purposes only.

theological institution, affiliated with the United Church of Christ, which primarily serves Northern New England congregations.

Rabbi Kenneth E. Ehrlich, Dean of the Rabbinical School at the Cincinnati campus of the Hebrew Union College-Jewish Institute of Religion. The College-Institute educates Reform Jewish leadership for service in approximately nine hundred congregations in North America.

Dr. Heather Elkins, Associate Dean of the Drew University Theological School in Madison, New Jersey. Drew University Theological School is an ecumenical theological institution affiliated with the United Methodist Church.

Dr. Jack Forstman, Dean *Emeritus*, acting Dean, and Finney Professor of Theology *Emeritus* at the Vanderbilt University Divinity School. The Vanderbilt Divinity School is a non-denominational, ecumenical theological school.

Dr. William McKinney, President and Professor of American Religion at the Pacific School of Religion in Berkley, California, and an ordained minister of the United Church of Christ. The Pacific School of Religion is an inter-denominational seminary of the United Church of Christ.

Dr. Elisabeth Nordbeck, Academic Dean of the Faculty and Vice President of Academic Affairs of the Andover Newton Theological School in New Centre, Massachusetts. Andover Newton is an ecumenical theological institution affiliated with the United Church of Christ, which serves more than forty religious denominations.

Rabbi Aaron D. Panken, Dean of Hebrew Union College-Jewish Institute of Religion in New York, New

York. The College-Institute educates Reform Jewish leadership for service in approximately nine hundred congregations in North America.

Dr. Robert E. Reber, Dean of the Auburn Theological Seminary in New York, New York. Auburn Theological Seminary devotes its resources to research on theological education for religious leadership and multi-faith education for laity and clergy.

Dr. Reverend T. Richard Snyder, Academic Dean and Professor of Theology and Ethics at the New York Theological Seminary in New York, New York. The New York Theological Seminary is an inter-denominational institution committed to preparing men and women to minister to New York metropolitan-area congregations. Its students are drawn from more than forty-five different church bodies.

Dr. Jacob J. Staub is the Vice President for Academic Affairs at the Reconstructionist Rabbinical College, the center for Reconstructionist Judaism worldwide. Rabbi Staub is a scholar of Jewish thought and a leading spokesperson for the Reconstructionist movement.

Dr. Fredrica Harris Thompsett, former Dean and current Mary Wolfe Professor of Theology at the Episcopal Divinity School in Cambridge, Massachusetts. The Episcopal Divinity School is an ecumenical theological institution affiliated with the Episcopal Church in the United States.

Dr. Richard J. Wood, Dean of the Yale University School of Divinity, an ordained United Methodist minister and a recorded Quaker minister. Yale Divinity School is a non-denominational, ecumenical theological institution.

SUMMARY OF THE ARGUMENT

The Boy Scouts of America (the "Boy Scouts") argue that homosexuality is inconsistent with a shared goal that brought its members together – to promote the view that homosexual conduct is not moral conduct. The Boy Scouts infer this supposedly shared goal of its multi-cultural membership, and its widely-diverse sponsoring institutions, from the requirements of the Scout Oath and Law that a Boy Scout be "morally straight" and "clean." While all organizations have the right to define their own goals, the Boy Scouts present no adequate basis for their conclusion that those who join and support Boy Scout troops around the country accept the view that a homosexual cannot be "morally straight" and "clean."

There is no clear consensus among American scholars of religion, or among the many religious institutions represented by the Boy Scouts' membership, that gays are to be excluded from full and equal participation in moral communities. To the contrary, a number of theologians, religious ethicists, and biblical scholars from diverse religious traditions recognize homosexual status to be consistent with a pledge to remain "morally straight," and with a commitment to promote the moral education of young men. A state law requiring the Boy Scouts to accept homosexual members as part of an effort to eliminate pervasive, historic discrimination against one class of citizens does not undercut the collective message of "clean" living advanced by the Boy Scouts.

ARGUMENT

THERE IS NO AGREEMENT AMONG THE DIVERSE RELIGIOUS INSTITUTIONS THAT SPONSOR BOY SCOUT TROOPS AND WHOSE MEMBERS BECOME SCOUTS THAT A HOMOSEXUAL CANNOT BE "MORALLY STRAIGHT" AND "CLEAN"

This case once again calls upon the Court to address a conflict between a state's effort to eliminate discrimination against its citizens and the protected freedom of association. Here, the Boy Scouts claim that a state law requiring them to accept an open homosexual as a member violates their right to select those with whom they wish to join in a common endeavor. Petitioners' Brief ("Pet'rs' Br.") 30-39.

This Court has previously addressed this issue in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (the "*Roberts* trilogy"). Under these cases, to establish a First Amendment bar to the New Jersey anti-discrimination law, the Boy Scouts must demonstrate that their acceptance of an openly gay man would materially interfere with their ability to promote the central mission that brought them together in the first place. *See, e.g., Roberts*, 468 U.S. at 623.

The Boy Scouts claim that requiring them to reinstate Respondent James Dale, an openly gay man, would defeat the shared expressive purpose of its members to promote the view that "homosexual conduct is not morally straight." Pet'rs' Br. 39. We do not purport to tell the Boy Scouts what their collective view towards homosexuality should be; every

organization has the right to define its own goals and values. However, there is no adequate basis to conclude, as Petitioners do, that the members and sponsors of the Boy Scouts endorse an anti-gay message when they accept a pledge to be "morally straight" and "clean."

As described by Petitioners, the Boy Scouts' historical mission, in relevant part, has been a positive one – to educate young men to engage in proper moral behavior. Pet'rs' Br. 2,3. The Boy Scouts concede that the organization has never articulated any anti-gay message ratified by members or their sponsoring organizations, and has never disseminated any written statement to its members concerning the admission of openly gay men and boys.[3]

The Boy Scouts argue, however, that admitting a known homosexual would be contrary to the moral message set forth in the Boy Scout Oath and Law. Pet'rs' Br. 6. The Oath, in part, requires each scout to be "physically strong, mentally awake and morally straight;" the Scout Law states that a scout, among other things, will be "clean." JA 184. Petitioners' fundamental premise is that Boy Scout members, leaders, and sponsoring institutions understand that a gay scout cannot be a "morally straight" and "clean"

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[3] Pet'rs' Br. at 5,6. Petitioners point to certain *post hoc* memoranda and statements explaining certain administrative actions, which state that their organization does not permit admission of openly gay men and boys. Joint Appendix ("JA") 453-61. While we understand that Mr. Dale challenges the relevance of these internal statements, *amici* limit our discussion to the mistaken assumption in the Boy Scouts principal argument, that its members embrace an anti-homosexual message when they commit to be "morally straight" and "clean."

scout.[4] Yet, there is no basis for this assumption in the record, in the positions of religious institutions that support scouting, or in the extensive religious scholarship on the morality of homosexuality.

The diverse religions traditions of this country present no coherent moral message that excludes gays and lesbians from participating as full and equal members of those institutions. Indeed, the movement among a number of the nation's major religious institutions for many decades has been toward public recognition of gays and lesbians as full members of moral communities, and acceptance of gays and lesbians as religious leaders, elders and clergy. A growing body of scholarship in the areas of religious ethics, biblical studies, and theology asserts that gay and lesbian believers must be recognized as full and equal members in religious communities.[5]

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[4] Pet'rs' Br. at 5,6. The Boy Scouts are not the first group to attempt to rationalize historic discrimination by an appeal to "morality." The *Dred Scott* decision, holding that slaves could not be deemed citizens under the Constitution, relied on the fact that the Declaration of Independence and Constitution had both been written at a time when slavery was almost universally considered a moral practice. *See Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The rightness of that peculiar institution, thought the Court, "was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion." *Id.* at 407. *See also* Mark D. Jordan, *The Invention of Sodomy in Christian Theology* 170 (1997): "This is not the first time that the body of believers has reached an impasse in moral reflection. Something very similar happened with the question of chattel slavery just over a century ago. . . "

[5] *See, e.g.*, John J. McNeill, *The Church and Homosexuals* (Beacon Press 3d ed, 1998); D.J. Atkinson, *Homosexuals in Christian Fellowship* (1979); *A Challenge to Love: Gay and Lesbian Catholics in The Church* (Robert Nugent ed., 1983); *Twice Blessed: On Being Lesbian, Gay, and Jewish*; (Christie Balka and Andy Rose eds., 1989); Eugene F. Rogers, Jr., *Sexuality and the Christian Body: Their Way into the Triune God*, (Gareth Jones and Lewis Ayres eds., 1999); Jordan, *supra* note 3.

Because there is no clear consensus among religious institutions or among religious scholars that a homosexual, by virtue of that status alone, may be considered "immoral," there is no meaningful basis for the Boy Scouts to claim that a pledge to be "morally straight" and "clean" demonstrates that its diverse members and sponsoring religious institutions share a collective goal of discriminating against gays and lesbians.

A. There Is No Consensus Among Religious Scholars That Homosexuality Is Immoral.

There is no consensus among American religious scholars and theologians that homosexuality is immoral.[6] As lesbians and gays have become more socially visible over the past half century, and as the physical and social sciences have advanced new understandings of the determinants of sexual orientation, cultural theorists and theologians have focused their attention on the nature of sexuality and on those parts of religious tradition that have condemned same-sex behavior.[7] The research of these scholars generally reflects three broad approaches to the issue: i) analyzing the specific language used in

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[6] *See, e.g., Homosexuality: Both Sides of the Debate*, (Jeffrey S. Siker ed., 1994); *The Sexuality Debate in North American Churches 1988-1995* (John Carey ed., 1995).

[7] *See, e.g.*, Robin Scroggs, *The New Testament and Homosexuality: Contextual Background for Contemporary Debate* (1983); *Biblical Ethics and Homosexuality: Listening to Scriptures* (Robert L. Brawley ed., Westminster John Know Press 1996).

biblical passages and the context for biblical references relating to same-sex behavior; ii) researching the history of church teachings and policies with respect to same-sex behavior, same-sex unions, and related issues; and iii) studying the process by which religious institutions and believers make moral and ethical decisions today. Each of these approaches has contributed new understandings to the issue of the morality of homosexuality.

1. Biblical Scholarship

A substantial body of scholarship surrounds the translation and interpretation of specific Old and New Testament passages addressing same-sex sexual behavior. Many scholars of these texts challenge the interpretations of biblical translations offered by those theologians who conclude that same-sex behavior is *per se* immoral. These biblical scholars challenge both the literal translation of the biblical texts and the interpretation of specific passages in historic and textual context.

Genesis 19:1-11 and Sodom Some biblical scholars and religious leaders point to the story in Genesis about the fall of Sodom as evidence of God's condemnation of homosexuality, because the men of Sodom are depicted raping male foreign guests.[8] "Sodomy," of course, has become widely used as a term for non-vaginal intercourse, generally, and specifically for sex between men.[9] But, recent biblical

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[8] The Bible, Book of Genesis 19:1-11 (Standard Revised Version). All citations to the Bible are to the Standard Revised Version.

[9] *See* Merriam-Webster's Collegiate Dictionary 111 (Frederick C. Mish ed., 10th ed. 1998); Jordan, *supra* note 3 at

scholars have convincingly refuted this interpretation. They have demonstrated that the "sin of Sodom" as described in Genesis was not, in fact, same-sex behavior, but instead involved such offenses as violent gang rape, inordinate prosperity, and in hospitality to the poor and needy.[10]

Leviticus 18:22 and 20:13 The Levitican declaration, "thou shall not lie with a male as with a woman," is similarly cited by some to be a blanket moral condemnation of same-sex intimacy. This passage, in context, identifies but one of the many activities proscribed for early Israelites as part of their "Purity Code."[11] This Code prohibits, among other acts, the eating of animals declared unclean (11:4-8); marriage of a chief priest to a woman widowed, divorced or defiled (21:14); ordination of maimed or deformed men (21:18-21); wearing clothes of mixed

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161; *Keeping Body and Soul Together, Report of Special Committee on Human Sexuality of the Presbyterian Church U.S.A.* 52 (1991).

[10] The Bible, Book of Ezekial 16:49-50. According to Jordan, "Sodomy," or the sin of the sodomites, was not homosexuality. Jordan, *supra* note 3 at 161. The "sin of sodom" was "the breach of ancient Hebrew hospitality norms and persistent violations of rudimentary social justice." Jordan, *supra* note 4 at 183-4. *See also* Keeping Body and Soul Together, *supra* note 8; Rabbi Bradley S. Artson, *Gay and Lesbian Jews: A Teshurah*, Jewish Spectator, Winter 1990, at 1-16; Rabbi Robert Gordis, *Homosexuality and Traditional Religion*, Judaism, 32, 4:405-09 (1983).

A similar interpretation is now given to the rape of Levite in Judges 19:22-26, *see Keeping Body and Soul Together, supra* note 8, at 52.

[11] *See* Saul M. Olyan, *And With a Male You Shall Not Lie the Lying Down of a Woman: On the Meaning and Significance of Leviticus 18:22 and 20:13, in Que[e]rying Religion: A Critical Anthology*, 398-414 (Gary David Comstock and Susan E. Henking eds., 1997); *Keeping Body and Soul Together, supra* note 8, at 52-3.

fibers (19:19); and eating shellfish. (11:9-12).[12] No other contemporaneous Israelite legal records or documentation prohibits same-sex sexual activity. [13]

Given the context of the sexual proscription in Leviticus and the lack of other similar statements on same-sex relations elsewhere in the Bible or in other contemporaneous religious texts, many scholars conclude that this passage does not reflect a moral condemnation of same sex intimacy, but reflects a civil code of conduct to which Christians and many Jews no longer adhere.[14] Moreover, Christian scholars have demonstrated that New Testament passages counsel that such codes must be subordinate to virtues of love and justice.[15]

Romans 1:23-27 Paul's Letter to the Romans is cited as a New Testament condemnation of same-sex behavior. Paul's letter, in one translation, states in reference to the Gentiles: "For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men

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[12] Olyan, *supra* note 10; *Keeping Body and Soul Together*, *supra* note 8, at 52-3.

[13] *Id.*

[14] "The [Levitican] taboos are part of an elaborate system of rituals and prohibitions that maintain and reinforce the socio-religious boundaries of the group and ensure that the group will continue to maintain its separate identity even under adverse conditions." Christine Davies, *Religious Boundaries and Sexual Morality*, in *Que[e]rying Religion: A Critical Anthology*, *supra* note 10, at 41; *Keeping Body and Soul Together*, *supra* note 8, at 52-3.

[15] *See, e.g.*, Book of Mark 7:1-23 and 5:21-43, Romans 14:13-14, , I Corinthians 8:1-11:1, Acts 8:26-40. *Keeping Body and Soul Together*, *supra* note 8 at 52.]

committing shameless acts with men and receiving in their own persons the due penalty for their error." The translating of this passage has been the subject of much debate, focussed on the true meaning of the original Greek text.[16] Recent scholarship indicates that this passage may not refer to same sex behavior generally, but to specific abusive practices of Greek and other Gentile men, most notably pederasty and prostitution of young boys.[17] Thus, some scholars assert that Paul's statements in Romans are not properly applied to the sexual conduct of consenting homosexual adults.[18]

I Corinthians 6:9-10 and I Timothy 1:10 These passages, which in different translations reference the sin of "sexual perverts" (I Corinthians 6:9) and "sodomites" (I Timothy 1:10), have also been cited as moral condemnation of consensual same-sex behavior. This interpretation, however, is criticized by recent scholars, based again in large measure on questions concerning the correct interpretation of the original Greek text. Scholars dispute translations of the Greek word "arsenokoitai," asserting that the term does not refer to modern forms of homosexuality.[19] Other scholars conclude that the passage condemns not same-sex intimacy, but a lifestyle of licentiousness

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[16] Dale B. Martin, *Arsenokoites and Malakos: Meanings and Consequences*, in *Biblical Ethics and Homosexuality: Listening to Scriptures*, *supra* note 6, at 11-123.

[17] Scroggs, *supra* note 6; William Countryman, *Dirt, Greed and Sex: Sexual Ethics in the New Testament and Their Implications for Today* (1988); *Keeping Body and Soul Together*, *supra* note 8; Eugene Rogers, *Sexuality and the Christian Body* 65 (1999).

[18] *Id.*

[19] Martin, *supra* note 15, at 11-123.

and lust, including fornication, idolatry, adultery and prostitution, whether heterosexual or homosexual.[20]

2. Religious History

Scholars of church history and theology have focused their attention on developing a fuller understanding of the historic treatment by churches and religious communities of those who practice same-sex intimacy or participate in same-sex relationships. While religious institutions have actively condemned same-sex behavior for major periods of Church history, historians have found this condemnation not to have been uniform. In some periods, important forms of acceptance of same-sex relationships appear.

The leading study of the history of Christianity and homosexuality is John Boswell's *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (1980). Boswell's survey of Christian teachings from the beginning of the church's existence to the Middle Ages undermines the common assumption that Christian theology has always opposed homosexuality.[21] As Boswell documents, early Christian views on the regulation of marriage and sexuality differed greatly from contemporary religious views.[22] Saint Paul, for example, did not demand that sexuality be limited to procreation, but only "disapproved of any form of sexuality which had as its end purely sexual pleasure," and "regarded licit

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[20] *See, e.g., Keeping Body and Soul Together, supra* note 8, at 52-3.

[21] *Id.* at 333.

[22] *Id.* at 26.

sexuality as that contained within a permanent and monogamous sexual relationship."[23] According to Boswell, there is no reason that same sex relations could not meet these moral criteria.[24]

Boswell also notes that the rise of urban cultures by the eleventh century led to the appearance of homosexual literature and a notable homosexual presence, yet governments did not criminalize homosexuality until the late thirteenth century.[25] It was not until the late nineteenth century that the term "homosexual" began to describe one's identity, and in the twentieth century gays became the victims of widespread and vehement intolerance.[26] Boswell thus cautions against projecting onto historical data ideas about homosexuality that may be skewed by current notions that are historically atypical.[27]

Boswell has also discovered early Christian liturgical texts that support forms of same-sex unions. Medieval texts contain evidence that early Christians granted liturgical blessing to certain same-sex unions, which Boswell finds inconsistent with any claim that all Christians viewed homosexuality as *per se*

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[23] *Id.* at 115.

[24] *Id.* at 116. As Boswell notes: "For Paul, Christian sexuality . . . was, rather, a question of good stewardship – of using sexuality in a way that was not obsessive, . . . and did not cause scandal, and did not distract Christians from the service of the Lord. . ." *Id.* at 115-16.

[25] *Id.* at 292-93; 333-34. Boswell notes that neither of the two most important twelfth – century English legal compilations even mentioned homosexuality.

[26] *See id.* at 23, 42 n.4.

[27] *Id.* at 24. *See generally* Martti Nissinen, *Homoeroticism in the Biblical World: A Historical Perspective* (Kirsi Stjerna, tran., 1998).

immoral.[28] Among the rituals he examined is a set of four early Christian ceremonies commemorating sacramental union: one for heterosexual betrothal, two for heterosexual marriage, and a comparable 'prayer' for the purpose of uniting two men.[29] The similarity in the wording of the rituals for heterosexual marriage and same-sex unions suggests parallel historical development in Christian theology.[30] These same-sex ceremonies – though their precise meaning and contours remain unclear – appear in liturgical manuscripts from throughout the medieval Christian world.[31]

3. Religious Ethicists

A substantial number of theologians and religious ethicists challenge the traditional ways in which ethical proscriptions concerning same-sex behavior have been derived. These contemporary scholars devote substantial attention to the processes through which moral and ethical norms are derived from biblical texts, natural law and religious traditions, and conclude that those texts and traditions–adequately understood and appropriately applied to the contemporary world–indicate that same-sex behavior can be viewed as moral in the very ways that other sexual behavior is evaluated.[32]

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[28] John Boswell, *Same-Sex Unions in Premodern Europe* (1994).

[29] *Id.* at 178-79.

[30] *Id.* at 179.

[31] *Id.* at 184-85.

[32] *See, e.g.*, John McNeill, *Taking a Chance on God: Liberating Theology for Gays, Lesbians, and Their Lovers, Families, and Friends* (1988); Rabbi Bradley S. Artson, *Gay and Lesbian Jews: A Teshurah, in Jewish Spectator,* Winter 1990; Letha Dawson

For example, these scholars apply a hermeneutical process to determine how biblical texts should be applied to the contemporary world.[33] The Bible contains passages on a number of issues (including slavery and the subordination of women) which require explanation and analysis in light of contemporary understandings of human identity and community.[34] Similarly, biblical teachings on a range of sexual issues (including marriage, divorce and related topics) are extremely complex.[35] Just as biblical teachings on this range of issues must be interpreted within the context of developing insights into the nature of human identity and sexuality.[36]

Theologians and religious ethicists pursuing this approach move away from modes of "proof-texting" and strict interpretation of biblical texts to call

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Scanzoni and Virginia Ramey Mollenkott, *Is the Homosexual My Neighbor?* (rev. ed. Harper San Francisco 1994); Thomas Thurston, *Homosexuality and Roman Catholic Ethics* (1994); Margaret A. Farley, *An Ethic of Same-Sex Relations, in Sexuality and the Sacred: Sources for Theological Reflection* (Nelson and Longfellow eds., 1994) at 54-67; Kathy Rudy, *Sex and the Church: Gender, Homosexuality and the Transformation of Christian Ethics* (1997).

[33] *See, e.g., Biblical Ethics and Homosexuality: Listening to Scripture, supra* note 6; George R. Edwards, *Gay/Lesbian Liberation: A Biblical Perspective* (1984); and Scroggs, *supra* note 6.

[34] Jordan, *supra* note 3, at 166-7; *See also, e.g., Biblical Ethics and Homosexuality: Listening to Scripture, supra* note 6; and Scroggs, *supra* note 6.

[35] Mary A. Tolbert, *Statement for Committee on Investigation, Northern California-Nevada Annual Conference, United Methodist Church,* February 2000, reprinted at http://www.psr.edulresorces/mto(bert1.htm).

[36] Jordan, *supra* note 3, at 166-7; *Keeping Body and Soul Together, supra* note 8; *See also, e.g., Biblical Ethics and Homosexuality: Listening to Scripture, supra* note 6; and Scroggs, *supra* note 6.

for a more reflective and self-aware process of moral decision-making. As one scholar has noted:

> "It is a curious but unmistakable phenomenon that Christian theologians treat so literally the limited references to homosexual practice in the Bible, while at the same time interpreting almost every other topic with such flexibility and non-literalness."[37]

These scholars also insist that religious traditions themselves be interrogated in this same fashion. They assert that the insights of human reason (including new forms of scientific knowledge), experience, and evolving social and historical contexts should be brought to bear in this process of ethical decision-making.[38] One of the principal methods of their analysis is the effort to derive comprehensive moral principles from the biblical text and religious traditions which are then applied to contemporary questions. With these basic principles in hand, religious institutions and believers can engage in the complex process of assessing the morality of contemporary sexual behavior.

Thus, for example, a number of theologians and religious ethicists focus specifically on the biblical themes of unity and equality before God as central to the biblical message.[39] In light of these themes,

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[37] *See, e.g.*, James B. Nelson, *Embodiment: An Approach to Sexuality and Christian Theology (1979)*; *Keeping Body and Soul Together*, *supra* note 8.

[38] *See Biblical Ethics and Homosexuality: Listening to Scripture supra* note 6; and Scroggs, *supra* note 6.

[39] *See, e.g.*, Nelson, *supra* note 36; Mary McClintock Fulkenson, *Gender — Being It or Doing It? The Church,*

ethicists argue for the full and equal membership of gay and lesbian believers in their religious communities. A number of Christian theologians stress the significance of Galatians 3:27-28 as pointing toward these principles: "For as many of you were baptized into Christ have put on Christ. There is neither Jew nor Greek, there is neither slave nor free, there is neither male or female; for you are all one in Christ Jesus."[40] Religious communities, these scholars argue, are called to fight against injustice, including all forms of prejudice against sexual minorities.[41]

Many scholars also argue that basic principles derived from the biblical text and religious traditions demonstrate that sexual and emotional wholeness is deeply connected to spiritual wholeness.[42] Homosexuals and heterosexuals equally share those needs.[43]

Other theologians and religious ethicists stress the theological values of human embodiment, touch and pleasure, and the spiritual power of friendship and erotic love to argue that lesbian and gay sexuality can be morally good.[44] In these perspectives, the morality and quality of same-sex relationships must

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Heterosexuality, and the Politics of Identity, Union Seminary Quarterly Review 47 (1993).

[40] Book of Galatians, 3:27-28.

[41] *See, e.g.*, Nelson, *supra* note 6; Fulkenson, *supra* note 38.

[42] Nelson, *supra* note 36.

[43] *Id.*

[44] *See, e.g.*, Nelson, *supra* note 36; Virginia Ramey Mollenkott, *Sensuous Spirituality: Out From Fundamentalism* (1992).

be judged on the same terms as heterosexual relationships.[45] In this approach, all sexual behavior, regardless of the gender of the parties, must be evaluated with regard to values of equality, fidelity, and mutual respect and responsibility.[46]

Contemporary theologians and ethicists argue that just as religious institutions provide support and guidance to their heterosexual members to help them conduct their intimate relationships in a moral fashion, so also these institutions must support their gay and lesbian members' efforts to establish strong, faithful intimate relationships.[47] With this support and guidance, same-sex relationships can lead to human flourishing in the same ways as heterosexual relationships.[48]

These few examples are intended only to demonstrate the quality and quantity of debate among religious scholars over the morality of same-sex intimacy. Nonetheless, decades of scholarship leave no doubt that homosexuality has not been viewed by all Christians and Jews as inconsistent with moral behavior. Certainly religious scholars do not share a common view that homosexuality *is* inconsistent with a moral life, as the Boy Scouts presume.

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[45] *See, e.g.*, Nelson, *supra* note 36; Carter Heyward, *Coming Out and Relational Empowerment, in No Easy Peace: Liberating Anglicanism — A Collection of Essays in Memory of William John Wolf* (Heyward and Phillips eds., 1992).

[46] *Id.*

[47] *See, e.g.*, Nelson, *supra* note 36; *Keeping Body and Soul Together*, *supra* note 8.

[48] *Id.*

B. A Number of Major American Religious Institutions Have Moved Toward Acceptance, Not Condemnation, of Homosexuals.

Over the last thirty years, many of the same religious institutions that support the Boy Scouts have internally debated the role of gay men and lesbians within their membership, issuing a variety of position statements on the topic. Although some conservative denominations have adhered to a blanket condemnation of homosexuality, the trend among a number prominent religious denominations has been toward acceptance of and support for gay and lesbian members and leaders in religious communities.

A number of institutions, including the United Church of Christ, the Unitarian Universalist Association, and Reformed and Reconstructionist Judaism, have moved toward full acceptance of gays and lesbians as members, lay leaders, and clergy. Still others, such as the Episcopal Church of the U.S.A., the United Methodist Church, and the Presbyterian Church of the U.S.A. have acknowledged the presence of gays and lesbians among their ranks and have set up committees to study issues of sexuality and religion. These committees have engendered great debate within their institutions about the treatment of gays and lesbians and issued vocal calls for an end to discrimination based on sexual orientation. These debates have even surfaced within very conservative religious institutions such as the Southern Baptist Convention.

1. Full Acceptance

Among the major Christian denominations in the United States, *The United Church of Christ* (the "UCC") was one of the earliest to promote acceptance

and tolerance toward gay men and lesbians. In 1972, the UCC became the first Christian denomination to ordain an openly gay person as a minister. In 1983, the UCC reaffirmed its acceptance of lesbians and gay men as clergy, when its delegates issued a statement that sexual orientation should not be grounds for refusing ordination of a minister. The UCC's General Synod, its highest decision-making body, has since reaffirmed that position.[49]

The *Unitarian Universalist Association* has also long supported an end to discrimination against gays and lesbians in the United States and promotes acceptance of homosexuals as full members and leaders within the church. In 1970, Unitarians called for "all people" to bring an end to discrimination on the basis of sexual orientation and asked all churches and fellowships to develop programs to promote that goal.[50] Unitarians have since reaffirmed that mission and called upon its ministerial division to work toward "settlement of qualified openly gay, lesbian and bisexual religious leaders."[51]

The governing body of *Reform Judaism* is also committed to ending discrimination on the basis of sexual orientation in both membership and leadership positions within that religious body. Indeed, in 1990, its governing board, the Union of American Hebrew

[49] General Synod of the United Church of Christ, *Resolution on Affirming Gay, Lesbian And Bisexual Persons and Their Ministries* (1991).

[50] General Assembly of the Unitarian Universalist Association, *Resolution on Discrimination Against Homosexuals and Bisexuals* (1970).

[51] General Assembly of the Unitarian Universalist Association, *Resolution on Ministerial Employment Opportunities* (1980).

Congregations, reaffirmed its public position that gays and lesbians may serve as rabbis.[52] In addition, the governing board of Reformed Judaism affirmed its approval of same sex-unions, as reflected in the 1996 statement by the Central Conference of American Rabbis.[53] The governing body of Reconstructionist Judaism maintains a similar position on acceptance of gays and lesbians as members and rabbis.[54]

2. Moving Toward Acceptance

For at least a quarter century, *The Protestant Episcopal Church in the U.S.A.* has opposed discrimination on the basis of sexual orientation and promoted equal treatment of gays and lesbians. In 1976, the Episcopal Church affirmed that "homosexual persons are children of God, who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church."[55] More recently, the Episcopal Church recommended that local bishops retain the discretion to conduct same-sex unions.[56]

The United Methodist Church has not approved the ordination of gays and lesbians as ministers, but it has called for an end to discrimination against gays

[52] Ad Hoc Conference on Homosexuality and the Rabbinate, *Report of Central Conference of American Rabbis* (1990).

[53] Central Conference of American Rabbis, *Resolution Adopted on Gay and Lesbian Marriage*, htt://www.ccarnet.org/cgi-bin/resodisp.pl?file=gl&year=1996

[54] *See* Rabbi Gail Diamond, *Reconstruction Values* (Jan. 2000) at http://www.jrf.org/agudasma/rabbi/Jan2000.htm

[55] General Convention of the Protestant Episcopal Church in the U.S.A., *Statement on Homosexuality* (1976).

[56] Julia Lieblich, *Episcopal Commission Agrees to Disagree on Gay Unions*, AP Wire Service, Feb. 14, 2000.

and lesbians. In the last decade, the Methodists announced their support for full civil rights for gays and lesbians and proclaimed that "homosexual persons no less than heterosexual persons are individuals of sacred worth."[57] Moreover, although not formally adopted by the Church, a 1991 report by a committee tasked with reviewing the Church's treatment of homosexuality reflects a movement within that church toward a more progressive viewpoint.[58]

The *Presbyterian Church of the U.S.A.* in 1988 convened a Committee on Human Sexuality to study, among other things, the causes of homosexuality, biblical teachings on homosexuality, and the recommended approach of the Presbyterian Church on issues of sexuality and religion.[59] This led to publication by that committee in 1991 of "Keeping Body and Soul Together," a detailed analysis of scriptural, scientific, and other evidence on

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[57] *The Book of Discipline of The United Methodist Church* – 1996, Section II para. 65(g).

[58] This four-year study concluded that present knowledge of homosexuality does not justify blanket condemnation of homosexual practice. At page 27, it notes that "some members of the Committee believe that the Creation accounts in Genesis express the will of God prescribing heterosexual marriage as the norm for all sexual relationships. Most members of the committee believe that the Genesis creation accounts are attempts to explain the way things were, not to prescribe what they should be, and that nothing is implied about the normative character of heterosexuality or about monogamy. . ." *Report of the Committee to Study Homosexuality to the General Council on Ministries of the United Methodist Church*, Aug. 24, 1991.

[59] Mary McClintock Fulkerson, *Church Documents on Human Sexuality and the Authority of Scripture, in Interpretation: A Journal of Bible and Theology* 49:1, 46-58 (Jan. 1995). *Keeping Body and Soul Together*, *supra* note 8.

homosexuality. The study recommends full acceptance of gays and lesbians.[60] Although not adopted by the General Assembly, that body did conclude that congregations should continue serious consideration of these issues and should reach their own conclusions on such sensitive issues.[61]

More recently, one regional governing body of the Presbyterian church held that lesbians and gays may continue to have same-sex unions and may continue to apply to be ministers.[62] Additionally, last year, a Presbyterian church tribunal ruled that a group of churches in New Jersey did not violate church laws by accepting a gay man as a candidate for ordination.[63]

3. Debates Within Conservative Institutions

Even among this nation's more conservative religious institutions, debate has emerged over the proper response to homosexuality. For example, even within the Southern Baptist Convention individual churches have moved in recent years to ordain openly-gay ministers and to bless same-sex unions, and these congregations have persisted in their progressive

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[60] *Keeping Body and Soul Together*, *supra* note 8.

[61] *The 203rd General Assembly (1991) Response to The Report of the Special Committee on Human Sexuality* (1991).

[62] *See, e.g.*, Jeffrey Gold, *Presbyterians Uphold Gay Man's Candidacy, Same-sex 'Holy Unions*, Associated Press, Nov. 23, 1999.

[63] *See, e.g., Presbyterian Decisions Back Gays; Gay Clergy and Same-Sex Marriage Cases, The Christian Century* 1218, Dec. 15,1999.

stand despite the vocal opposition and even expulsion from the convention[64]

The movement of these prominent, mainstream religious institutions toward acceptance of gays and lesbians as full members and as religious leaders belies any claim that this nation's religious traditions share a clear view that homosexuality is inconsistent with moral rectitude.

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As this discussion demonstrates, no clear consensus exists among biblical scholars, religious historians or theologians that homosexuality should be viewed as incompatible with a moral life. Similarly, no consensus exists among this nation's major religious institutions that homosexuality is inconsistent with moral behavior, or that homosexuals should not fully participate in the life of religious communities.

Given this reality, there is no proper basis for the Boy Scouts to presume that their members and sponsoring organizations implicitly agree that one cannot be gay and also be "morally straight." Every organization has the right to define its own values, and we do not mean to tell the Boy Scouts what their moral message should be. But, taking the pledge required for membership in the Boy Scouts does not itself imply acceptance of the anti-gay viewpoint suggested by Petitioners in this lawsuit.

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[64] *See* Pat Long, *Pullen Memorial Baptist Church: An Inside Look at a Journey of Affirmation, in Que[e]rying Religion: A Critical Anthology, supra* note 11.

CONCLUSION

The judgment of the New Jersey Supreme Court should be affirmed. The State of New Jersey has a legitimate interest in eliminating historic discrimination. Prohibiting discrimination against homosexuals does not undercut the Boy Scouts' stated mission of moral education, and is not inconsistent with their pledge to be "morally straight" and "clean."

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New York, New York

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